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# State v. Calver Appellant's Reply Brief Dckt. 39637

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 39637
	)	
v.	)	ADA COUNTY NO. CR-2011-14868
	)	
VERONICA LYNN CALVER,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA

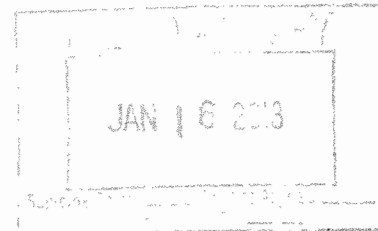
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## STATEMENT OF THE CASE

### Nature of the Case

Veronica Lynn Calver is the mother of R.C. and, as such, has a recognized fundamental right to parent R.C. Raymond Calver, R.C.'s father, filed for divorce two days prior to Veronica Calver moving to Tennessee with R.C. and Ms. Calver's two older children (neither the natural or adoptive children of Raymond Calver). An Ada County magistrate issued a *pro forma* Joint Temporary Restraining Order (*hereinafter*, JTRO) upon the divorce filing, prohibiting either Raymond or Veronica from "removing" R.C. from the State of Idaho for periods exceeding 72 hours. Ms. Calver was arrested in Tennessee and, rather than being charged with contempt of court for allegedly violating the JTRO, she was charged with custodial interference and was later convicted.

Ms. Calver raised three issues in her Appellant's Brief. First, she asserted that, because the Information alleged that Ms. Calver violated only those of Mr. Calver's custody rights arising from the JTRO, and the JTRO did not actually bar Ms. Calver from taking, keeping, or withholding R.C. from Raymond Calver, but merely stated that neither party could remove R.C. from the State of Idaho except for periods not exceeding 72 hours, there was insufficient evidence to demonstrate that she was "without lawful authority" to violate any of Mr. Calver's custodial rights by taking, keeping, or withholding R.C. from Mr. Calver. Thus, Ms. Calver asserted that the State failed to provide sufficient evidence to support her conviction for custodial interference.

Next, Ms. Calver asserted that if this Court finds the JTRO established that Raymond Calver had a custodial or parental right to have R.C. somewhere in the State

of Idaho, the jury instructions failed to require the jury to find a violation of this specific right. The jury was instructed that they must convict Veronica Calver if they found she “took, kept, or withheld” R.C. from Raymond Calver, conduct which Ms. Calver had the lawful authority to engage in, rather than requiring the jury to find that Ms. Calver “took” R.C. out of the Idaho for longer than 24 hours. As such, Ms. Calver asserted that the jury instructions were erroneous and the error was not harmless, requiring this Court to vacate her conviction

Finally, Ms. Calver asserted that the jury instructions contained a fatal variance as they instructed the jury that a person’s “right to custody” may arise either from a specific custody order, the allegation made in the Information, or from “the equal custodial rights of each parent in the absence of a custody order,” an allegation not made in the Information. Because the jury instructions allowed the jury to convict Ms. Calver on a charge not made, she asserts that her conviction must be vacated and her case remanded for a new trial.

In its Respondent’s Brief, the State has made various assertions in support of its claim that this Court should affirm Ms. Calver’s conviction. This Reply Brief is necessary to address some of the State’s assertions.

#### Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Ms. Calver’s Appellant’s Brief. They need not be repeated in this Reply Brief in detail, but are incorporated herein by reference thereto.

### ISSUES

1. Should this Court vacate Ms. Calver's conviction for custodial interference as the State failed to provide sufficient evidence that Ms. Calver was "without lawful authority" to "take, keep or withhold" R.C. from Mr. Calver?
2. Was Ms. Calver's right to due process of law violated by the district court erroneously instructing the jury on the findings of fact necessary to support a guilty verdict?
3. Does there exist a fatal variance between the Information and the jury instructions, as the jury instructions advised that Mr. Calver's custodial rights could arise either from a custodial order, as alleged in the Information, or from his equal custodial right as a parent, which was not alleged in the Information?

## ARGUMENT

### I.

#### This Court Should Vacate Ms. Calver's Conviction For Custodial Interference As The State Failed To Provide Sufficient Evidence Ms. Calver Was "Without Lawful Authority" To "Take, Keep Or Withhold" R.C. From Mr. Calver

A person cannot be found guilty of custodial interference unless the state proves, beyond a reasonable doubt, the person did not have the lawful authority" to interfere with another's custodial rights. The only limitation on Ms. Calver's right to parent in this case was the JTRO issued by a magistrate court when Mr. Calver filed for divorce. The Information in this case specifically alleged that the only rights Mr. Calver enjoyed that were purportedly violated by Ms. Calver, "[arose] from [the] temporary restraining order regarding the child in CV-DR-2011-16503." As such, the State could not convict Ms. Calver of custodial interference absent proof that she both violated the specific terms of JTRO, and that the JTRO granted Mr. Calver the very custodial rights Ms. Calver was alleged to have interfered with.

The State appears to agree with Ms. Calver's argument that, as R.C.'s mother, she has a fundamental constitutional right to make parenting decisions that, in this case, was limited only by the terms of the JTRO. (See Appellant's Brief, pp.9-11; Respondent's Brief, pp.7-8.) The State's argument that there was sufficient evidence that to support a jury finding that Ms. Calver violated *the specific terms of the JTRO* is well-taken, and had it been alleged, a judge could have reasonably found her to be in contempt of court. (See Respondent's Brief, pp.9-10.) However, the State's argument that there was sufficient evidence to demonstrate that *Mr. Calver's rights* were violated by Ms. Calver, merely because he is R.C.'s father (Respondent's Brief, pp.10-12), is



without merit. Ms. Calver was not alleged to have violated Mr. Calver's "equal custodial rights ... in the absence of a custody order"; rather, she was specifically alleged to have violated Mr. Calver's rights as provided by the JTRO, rights that the State apparently does not now contend were violated by Ms. Calver.

Idaho Code § 18-4506(a) reads as follows:

A person commits child custody interference if the person, whether a parent or other, or agent of that person, intentionally and without lawful authority:

(a) Takes, entices away, keeps or withholds any minor child from a parent or another person or institution having custody, joint custody, visitation or other parental rights, whether such rights arise from temporary or permanent custody order, **or** from the equal custodial rights of each parent in the absence of a custody order[.]

I.C. § 18-4506(a) (emphasis added). By its plain language, the custodial right of a person may arise *either* from a specific custody order *or* from the equal custodial right of each parent. *Id.* However, the State chose not to allege that Mr. Calver's "equal custodial rights ... in the absence of a custody order" were violated. The State specifically alleged,

That the Defendant, VERONICA L CALVER AKA HANEY, on or between the 8<sup>th</sup> day of September, 2011 and the 10th day of October, 2011, in the County of Ada, State of Idaho, did intentionally and without lawful authority, take and/or keep and/or withhold, a minor child, R. C., a child of the age of two (2), from Raymond Calver and **who has joint custody and/or other parental rights arising from temporary restraining order regarding the child in CV-DR-2011-16503** and/or after commencement of an action relating to child visitation or custody but prior to the issuance of an order and where the defendant took the child out of state and where the child has not voluntarily been returned unharmed to Idaho.

(R., pp.29-30 (emphasis added).) Because the State did not allege the alternative means of committing the crime, the State cannot rely upon evidence that Ms. Calver

committed the crime in an alternative manner. *C.f. State v. Folk*, 151 Idaho 327, 340 (2011) (recognizing that where the defendant was charged with committing lewd conduct through oral-genital contact, the district court erred by instructing the jury that the definition of lewd-conduct includes alternative means of committing the crime, as the defendant could not be convicted of committing lewd conduct through means not alleged in the charging document). In short, because the Information alleged that Mr. Calver's parental rights specifically arose through the JTRO, absent evidence that Ms. Calver's actions deprived him of those rights granted through the JTRO, there was insufficient evidence to support her conviction.

For the reasons more fully articulated in section I of the Appellant's Brief, Ms. Calver asserts there was insufficient evidence to support her conviction and this Court must vacate her conviction.

## II.

### Ms. Calver's Right To Due Process Of Law Was Violated By The District Court Erroneously Instructing The Jury On The Findings Of Facts Necessary To Support A Guilty Verdict

Ms. Calver argued in her Appellant's Brief that, should this Court find there was sufficient evidence to sustain her conviction, it nevertheless must vacate her conviction because the jury instructions erroneously informed the jury they could find Ms. Calver guilty if they found she "kept and/or withheld" R.C. from Raymond Calver, as an alternative to finding she "took" R.C. from Mr. Calver. (Appellant's Brief, pp.16-28.) As such, Ms. Calver asserted the jury was falsely instructed that they could find her guilty if they found that she engaged in conduct she had the lawful authority to engage in. *Id.*

In its Respondent's Brief, the State generally argues that Ms. Calver has not met her burden under a *Perry*<sup>1</sup> fundamental error analysis. (Respondent's Brief, pp.12-20.) The State's argument is generally unremarkable and, therefore, Ms. Calver relies upon the arguments and authorities she provided on this issue in the Appellant's Brief. However, it should be noted that the State is now taking a position contrary to the argument it made to the jury in this case. In its Respondent's Brief, the State asserts the following:

**However, reviewing the instructions as a whole reveals that the "kept and/or withheld" language in instruction no. 10 was, at worst, unnecessary and irrelevant to the jury's determination.** Its inclusion does not amount to a constitutional violation. Regardless of whether the jury found that Calver took, kept, or withheld R.C. from Raymond, it was also required to find that Calver committed such an act or omission "without lawful authority." (R., p.80.) Calver's custodial authority was only addressed in two ways at trial – one, in terms of the limitations placed on it by the joint temporary restraining order (which prevented her from "taking" R.C. out of the state), and two, as part of her necessity defense in that Calver contended that she was not "without lawful authority" to act because she was doing so to protect R.C. and herself from imminent physical harm. **There was no basis for the jury to find that Calver "kept and/or withheld" R.C. "without lawful authority," and thus, there is no basis for concluding that the jury could have convicted Calver based on legal conduct. Thus, while the "kept and/or withheld" language was unnecessary and irrelevant to the jury's determination, it did not violate Calver's constitutional rights.**

(Respondent's Brief, p.16 (emphasis added).) It appears that the State agrees with Ms. Calver's argument that she could not be convicted if the jury found that she "kept and/or withheld" R.C. from Mr. Calver. However, in addition to the fact that the jury instructions *required* the jury to convict Ms. Calver if they found that she "kept and/or withheld" R.C. from Mr. Calver, the prosecutor specifically argued this point to the jury. During closing arguments, the prosecutor stressed to the jury the State *did not* have to

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<sup>1</sup> See *State v. Perry*, 150 Idaho 209 (2010).

prove Ms. Calver merely “removed” R.C. from Idaho, but that they sustained their burden if they showed she “kept” or “withheld” R.C. from Mr. Calver. (Tr.2/20/12, p.264, Ls.7-12 (prosecutor arguing “She took and kept or withheld the child” and “She took [R.C.] to Tennessee without lawful authority.”); p.265, Ls.12-16 (prosecutor arguing Ms. Calver knew about the order because an officer told her about it (which occurred after she left Idaho)); p.288, Ls.15-21 (prosecutor arguing the “took and/or kept and/or withheld” language shows that the State need prove only one of those factors, not all three.)) As such, the State cannot now rely upon its belief that the jury would have understood that they could only find Ms. Calver guilty if they found she “took” R.C. away from Mr. Calver. In short, the State presented evidence that Ms. Calver “kept” or “withheld” R.C. from Mr. Calver and argued that the jury could find her guilty for that behavior. The error is fundamental and not harmless.

For the reasons more fully articulated in section II of the Appellant's Brief, this Court should vacate Ms. Calver's conviction.

### III.

There Exists A Fatal Variance Between The Information And The Jury Instructions, As The Jury Instructions Alleged Mr. Calver's Custodial Rights Could Arise Either From A Custodial Order, As Alleged In The Information, Or From His Equal Custodial Right As A Parent, Which Was Not Alleged In The Information

In her Appellant's Brief, Ms. Calver asserted that the jury instructions erroneously stated Mr. Calver's custodial or other parental rights arose either from the JTRO or his “equal custodial rights” as R.C.'s father. (Appellant's Brief, pp.29-33.) Because the Information alleged Mr. Calver's custodial or parental rights stem directly from the JTRO, not from anywhere else, Ms. Calver asserted that this additional “equal custodial

rights” language constitutes a fatal variance requiring this Court to vacate her conviction. *Id.*

In its Respondent's Brief, the State generally argues that Ms. Calver has failed to meet her burden under a *Perry*<sup>2</sup> fundamental error analysis. (Respondent's Brief, pp.20-27.) The State's argument is generally unremarkable and, therefore, Ms. Calver relies upon the arguments and authorities she provided on this issue in the Appellant's Brief. However, the State argues that rather than alleging that Mr. Calver's parental rights, as allegedly violated by Ms. Calver, arose only from the JTRO, the Information alleges that those rights arose either from the JTRO or Mr. Calver's "joint custody." (Respondent's Brief, pp.23-25.) This argument is without merit.

As noted above, The Information specifically alleged,

That the Defendant, VERONICA L CALVER AKA HANEY, on or between the 8<sup>th</sup> day of September, 2011 and the 10th day of October, 2011, in the County of Ada, State of Idaho, did intentionally and without lawful authority, take and/or keep and/or withhold, a minor child, R. C., a child of the age of two (2), from Raymond Calver and **who has joint custody and/or other parental rights arising from temporary restraining order regarding the child in CV-DR-2011-16503** and/or after commencement of an action relating to child visitation or custody but prior to the issuance of an order and where the defendant took the child out of state and where the child has not voluntarily been returned unharmed to Idaho.

(R., pp.29-30 (emphasis added).) Although recognizing that Ms. Calver's reading of this Information is "plausible" (see Respondent's Brief, p.24, f.n. 2), the State nevertheless asserts that, "the information alleged that Raymond was a qualified victim pursuant to I.C. § 18-4506(a), and that his custodial authority came from: (1) his joint custody,

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<sup>2</sup> See f.n. 1 above.

and/or (2) other parental rights arising from the temporary restraining order regarding the child in CV-DR-2001-16503.” (Respondent’s Brief, p.24.)

The State’s argument fails in that it equates the term “joint custody” with the term “equal custodial rights of each parent in the absence of a custody order” as is contained in Idaho Code § 18-4506(a). However, the term “joint custody” has a specific meaning under Idaho law. Idaho Code § 32-717B(1) defines the term as follows:

(1) “Joint custody” means **an order awarding custody** of the minor child or children to both parents and providing that physical custody shall be shared by the parents in such a way as to assure the child or children of frequent and continuing contact with both parents. The court may award either joint physical custody or joint legal custody or both as between the parents or parties as the court determines is for the best interests of the minor child or children. **If the court declines to enter an order awarding joint custody, the court shall state in its decision the reasons for denial of an award of joint custody.**

I.C. § 32-717B(1) (emphasis added). Under Idaho law, the term “joint custody” refers to custody specifically awarded *by a custody order*. Thus, contrary to the State’s argument, where the Information alleged that Mr. Calver “has joint custody and/or other parental rights arising from temporary restraining order regarding the child in CV-DR-2011-16503,” the Information specifically alleged that this “joint custody” arose specifically from the JTRO. The State’s contrary interpretation of the allegation contained in its own Information is simply inconsistent with the definition of “joint custody” provided by Idaho statute. Thus, Ms. Calver’s interpretation of this term is the *only* plausible interpretation.

For the reasons more fully articulated in section III of the Appellant’s Brief, this Court should vacate Ms. Calver’s conviction.

### CONCLUSION

Ms. Calver respectfully requests that this Court vacate her conviction and instruct the district court to enter a judgment of acquittal. Alternatively, she respectfully requests that this Court vacate her conviction and remand her case to the district court for a new trial.

DATED this 16<sup>th</sup> day of January, 2013.

A handwritten signature in black ink, appearing to read "J. C. Pintler", followed by the word "for:".

JASON C. PINTLER  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16<sup>th</sup> day of January, 2013, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

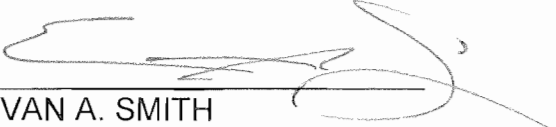
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